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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

[Docket No. FCIC-17-0002]

RIN 0563-AC58

Common Crop Insurance Regulations; California Avocado Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule with request for comments.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Common Crop Insurance Regulations to provide California Avocado insurance. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions (Basic Provisions), which contain standard terms and conditions common to most crop programs. The intended effect of this action is to convert the California Avocado pilot crop insurance program to a regulatory insurance program for the 2020 and succeeding crop years.

DATES: *Effective date:* This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: The changes are applicable for the 2020 and succeeding crop years. California avocado is a two-year policy and the 2020 crop year encompasses all policies earning premium when insurance attaches after the Contract Change Date of August 31, 2018.

Comment due date: FCIC will accept written comments on this final rule until close of

business [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. FCIC may consider the comments received and may conduct additional rulemaking based on the comments.

ADDRESSES: FCIC prefers that comments be submitted electronically through the Federal eRulemaking Portal. You may submit comments, identified by Docket ID No. FCIC-17-0002, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Director, Actuarial and Product Design Division, Risk Management Agency, United States Department of Agriculture, P. O. Box 419205, Kansas City, MO 64141-6205.

FCIC will post all comments received, including those received by mail, without change to <http://www.regulations.gov>, including any personal information provided. Once these comments are posted to this website, the public can access all comments at its convenience from this website. All comments must include the agency name and docket number or Regulatory Information Number (RIN) for this rule. For detailed instructions on submitting comments and additional information, see <http://www.regulations.gov>. If interested persons are submitting comments electronically through the Federal eRulemaking Portal and want to attach a document, FCIC requests that the document attachment be in a text-based format. If interested persons want to attach a document that is a scanned Adobe PDF file, it must be scanned as text and not as an image, thus allowing FCIC to search and copy certain portions of the submissions. For questions regarding attaching a document that is a scanned Adobe PDF file, please contact the Risk

Management Agency (RMA) Web Content Team at (816) 823-4694 or by email at rmaweb.content@rma.usda.gov.

Privacy Act: Anyone is able to search the electronic form of all comments received for any dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the complete User Notice and Privacy Notice for *Regulations.gov* at <http://www.regulations.gov/#!privacyNotice>.

FOR FURTHER INFORMATION CONTACT: Ron Lundine, Director, Product Management, Actuarial and Product Design Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812, Room 421, PO Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–3854.

SUPPLEMENTARY INFORMATION:

Background

FCIC offered an actual production history pilot crop insurance program for California grown avocados beginning with the 2010 crop year. The pilot program is offered in six California counties. In 2013, the FCIC’s Board of Directors approved continuation and expansion until such time the program could be made permanent. For the 2016 crop year, 1,041 policies were sold and 35,072 acres of avocado orchards were insured in California. This rule will add the California avocado program to the Code of Federal Regulations.

The FCIC is issuing this final rule without opportunity for prior notice and comment. The Administrative Procedure Act (APA) exempts rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” from the statutory

requirement for prior notice and opportunity for public comment (5 U.S.C. 553(a)(2)). A Federal crop insurance policy is a contract and is thus exempt from APA notice-and-comment procedures.

Previously, changes made to the Federal crop insurance policies codified in the Code of Federal Regulations were required to be implemented through the notice-and-comment rulemaking process. Such action was not required by the APA, which exempts contracts. Rather, the requirement originated with a notice USDA published in the Federal Register on July 24, 1971 (36 FR 13804) stating that the Department of Agriculture would, to the maximum extent practicable, use the notice-and-comment rulemaking process when making program changes, including those involving contracts. FCIC complied with this notice over the subsequent years. On October 28, 2013, USDA published a notice in the Federal Register (78 FR 64194) rescinding the prior notice, thereby making contracts again exempt from the notice-and-comment rulemaking process. This exemption applies to the 30-day notice prior to implementation of a rule. Therefore, the policy changes made by this final rule are effective upon publication in the Federal Register.

However, FCIC is providing a 30-day comment period and invites interested persons to participate in this rulemaking by submitting written comments. FCIC may consider the comments received and may conduct additional rulemaking based on the comments.

Executive Orders 12866, 13563, 13771 and 13777

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” established a federal policy to alleviate unnecessary regulatory burdens on the American people. The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866, “Regulatory Planning and Review,” and therefore, OMB has not reviewed this rule. The rule is not subject to Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.”

Paperwork Reduction Act of 1995

Pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, subchapter I), the collections of information in this rule have been approved by OMB under control number 0563-0053.

E-Government Act Compliance

FCIC is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the

requirements of sections 202 and 205 of UMRA.

Executive Order 13132

It has been determined under section 1(a) of Executive Order 13132, Federalism, that this rule does not have sufficient implications to warrant consultation with the States. The provisions contained in this rule will not have a substantial direct effect on States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Federal Crop Insurance Corporation has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under E.O. 13175. If a Tribe requests consultation, the Federal Crop Insurance Corporation will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Regulatory Flexibility Act

FCIC certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Program requirements for the Federal crop insurance program are the same for all producers regardless of the size of their farming operation. For instance, all producers are required to submit an application and acreage report to establish their insurance guarantees and compute premium amounts, and all producers are required to submit a notice of loss and production information to determine the indemnity amount for an insured cause of crop loss. Whether a producer has 10 acres or 1000 acres, there is no difference in the kind of information collected. To ensure crop insurance is available to small entities, the Federal Crop Insurance Act (FCIA) authorizes FCIC to waive collection of administrative fees from limited resource farmers. FCIC believes this waiver helps to ensure that small entities are given the same opportunities as large entities to manage their risks through the use of crop insurance. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have a significant impact on a substantial number of small entities, and, therefore, this regulation is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605).

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See 2 CFR part 415, subpart C.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. With respect to any direct action taken by FCIC or action by FCIC directing the insurance provider to take specific action under the terms of the crop insurance policy, the administrative appeal provisions published at 7 CFR part 11 must be exhausted before any action against FCIC for judicial review may be brought.

Environmental Evaluation

This action is not expected to have a significant impact on the quality of the human environment, health, or safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

List of Subjects in 7 CFR Part 457

Crop Insurance, California Avocado, Reporting and Recordkeeping Requirements.

Final Rule

Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR part 457 applicable for the 2020 and succeeding crop years as follows:

PART 457-COMMON CROP INSURANCE REGULATIONS

1. The authority citation for part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

2. Section 457.175 is added to read as follows:

§ 457.175 California avocado crop insurance provisions.

The California avocado crop provisions for the 2020 and succeeding crop years are as follows:

FCIC policies:

UNITED STATES DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

California Avocado Crop Provisions

1. Definitions.

CDFA. The California Department of Food and Agriculture.

Commercial sale. Any transaction in which avocados have been inspected under the rules of the CDFA and to which a marketing assessment payment applies under the Hass Avocado Promotion, Research, and Information Act of 2000.

Crop year. The period of time that begins on December 1 immediately prior to the time the avocado trees normally bloom and that ends on October 31 of the calendar year following such bloom. Crop year is designated by the calendar year following the year in which the avocado trees normally bloom.

Direct marketing. The sale of the insured crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper, or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the fields for the purpose of picking all or a portion of the crop.

Harvest. Picking of marketable avocado fruit from the trees or from the ground when permitted as described in section 11(c).

Initially apply. Your application for crop insurance under these Crop Provisions for the first time and following each time you have cancelled the insurance or the insurance has terminated by action of the policy.

Interplanted. Acreage in which two or more crops are planted in any form of an alternating or mixed pattern.

Marketable. An avocado fruit that meets the standards published by the CDFA with respect to maturity, defects, size, and weight.

No. 2 avocado. An avocado fruit that is marketable but that is diverted into processing uses due to visual defects resulting from an insured cause of loss.

Pound. A unit of weight equal to sixteen ounces avoirdupois.

Rootstock. The root and stem portion of a tree to which a scion can be grafted.

Scion. Twig or portion of a twig of one plant that is grafted onto a rootstock.

Set out. Transplanting a tree into the orchard or grafting a scion onto rootstock.

Stumping. A practice whereby the lateral branches of an avocado tree are removed. A portion of the bole also may be removed. The resulting stump is approximately 4 feet or greater in height.

Type. A term used to designate different varieties of avocados, as more fully described in the Special Provisions.

2. Unit Division.

(a) Unless limited by the Special Provisions, a basic unit as defined in section 1 of the Basic Provisions may be divided into optional units if, for each optional unit, you meet the following:

(1) All optional units you select for the crop year are identified on the acreage report for that crop year (Units will be determined when the acreage is reported but may be adjusted or combined to reflect the actual unit structure when adjusting a loss. No further unit division may be made after the acreage reporting date for any reason);

(2) You have records that are acceptable to us for at least the most recently completed crop year for all optional units that you will report in the current crop year (You may be required to produce the records for all optional units for the most recently completed crop year);

(3) You have records of marketed or stored production from each optional unit maintained in such a manner that permits us to verify the production from each optional unit, or the production from each optional unit is kept separate until loss adjustment is completed by us.

(b) Each optional unit must meet one or more of the following conditions, unless otherwise specified in the Special Provisions:

(1) Be of a different type; or

(2) Consist of acreage located on non-contiguous land.

(c) Subsections (a) and (c) of section 34 of the Basic Provisions do not apply to these Crop Provisions.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.

In addition to the requirements of section 3 of the Basic Provisions:

(a) You may select only one coverage level for all the avocados in the county insured under this policy.

(b) You must report, on or before the production reporting date designated in section 3 of the Basic Provisions, by unit:

(1) Any damage, stumping (including the year or years that the stumping was performed), or removal of trees; change in orchard practices; or any other circumstance

that may reduce the expected yield per acre to less than the approved yield and the number of affected acres and trees;

- (2) The number of trees on insurable and uninsurable acreage;
- (3) The age of the trees;
- (4) Any acreage excluded under section 6 of these Crop Provisions; and
- (5) For acreage interplanted with another crop:
 - (i) The age of the interplanted crop, and type if applicable;
 - (ii) The planting pattern; and
 - (iii) Any other information we request to establish your approved yield per acre.

(c) We will reduce the approved yield whenever we determine any one or more of the factors specified in this section are likely to have a negative impact upon that average yield. If you fail to provide complete and accurate information required by this section, and pursuant to the definition of approved yield, we will reduce that yield as necessary at any time we become aware of any such omission.

(d) In the event the avocado trees are damaged to the extent that we determine the APH history you certified no longer is representative of the potential production of the unit, we will reduce your approved yield to a level consistent with that reduced potential. Such reduction will not occur for a crop year for which insurance already has attached if the damage is due to a cause of loss that is insurable for the avocado fruit.

(e) In lieu of that specific provision in section 3(f) of the Basic Provisions, you are required to report the production for the crop year that ended on the October 31 immediately preceding the cancellation date. For example, you must report your

production for the 2008 crop year by the production reporting date for the 2010 crop year.

All other provisions of section 3(f) apply.

(f) When you initially apply for insurance:

(1) You must certify your production records for at least the most recently completed crop year;

(2) If you do not certify your production records for any one or more of the three crop years immediately prior to the most recently completed crop year, you will be assigned a percentage of the transitional yield included in the actuarial documents for that crop year.

The percentages will be those described in 7 CFR Part 400 Subpart G. All other provisions of 7 CFR Part 400 Subpart G apply.

4. Contract Changes.

In accordance with section 4 of the Basic Provisions, the contract change date is the August 31 that precedes the cancellation date.

5. Cancellation and Termination Dates.

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are the November 30 immediately prior to the first day of the crop year.

6. Insured Crop.

(a) In accordance with section 8 of the Basic Provisions, the crop insured will be all the avocados in the county grown on insurable acreage, and for which premium rates are provided:

(1) In which you have a share;

(2) That is grown for harvest as avocado fruit for commercial sale;

(3) That is a type identified in the actuarial documents;

(4) That is irrigated; and

(5) That is grown on trees that, if inspected, are considered acceptable to us.

(b) In addition to the provisions of section 8 of the Basic Provisions that identify an uninsurable crop, we do not insure any avocados produced on trees that have not reached the sixth growing season after set out unless the unit has produced an average of at least 2,000 pounds of avocados per acre in one of the most recent three crop years or as otherwise specified in the Special Provisions.

(c) Avocado trees that have been stumped are not insurable for three calendar years after the year stumping was performed. The calendar year stumping occurred will be considered to be the actual calendar year if performed between January 1 and June 30 of that year. It will be considered to be the following calendar year if performed between July 1 and December 31.

7. Insurable Acreage.

(a) In lieu of that part of section 9 of the Basic Provisions that prohibits insurance attaching to a crop planted with another crop, avocados interplanted with another perennial crop are insurable unless we inspect the acreage and determine it does not meet the requirements of insurability contained in these Crop Provisions.

(b) In addition to the acreage designated as not insurable in section 9 of the Basic Provisions, we will not insure avocados produced on any acreage infected with Phytophthora root rot unless you follow good orchard management practices as recommended by agricultural experts.

8. Insurance Period.

(a) In accordance with the provisions of section 11 of the Basic Provisions:

(1) Coverage begins on December 1st of the crop year.

(2) The calendar date for the end of the insurance period is the second October 31st of the crop year.

(b) In addition to the provisions of section 11 of the Basic Provisions:

(1) If you acquire an insurable share in any insurable acreage on or before the acreage reporting date of any crop year, and if we inspect and consider the acreage acceptable, insurance will be considered to have attached to such acreage on the calendar date for the beginning of the insurance period.

(2) If you relinquish your insurable interest on any acreage of avocados on or before the acreage reporting date of any crop year, insurance will not be considered to have attached to such acreage for that crop year unless:

(i) A transfer of right to an indemnity or a similar form approved by us is completed by all affected parties;

(ii) We are notified by you or the transferee in writing of such transfer on or before the acreage reporting date; and

(iii) The transferee is eligible for crop insurance.

No premium will be due or indemnity paid unless a properly executed transfer of right to an indemnity has been filed with us.

9. Causes of Loss.

(a) In accordance with section 12 of the Basic Provisions, insurance is provided against unavoidable loss of production due to the following causes of loss occurring within the insurance period:

(1) Adverse weather conditions;

(2) Fire, unless weeds and other forms of undergrowth have not been controlled or pruning debris has not been removed from the orchard;

(3) Insects and disease, but not damage due to insufficient or improper application of control measures;

(4) Wildlife;

(5) Earthquake;

(6) Volcanic eruption; or

(7) Failure of the irrigation water supply due to an insured cause of loss specified in sections 9 (a)(1) through (6).

(b) In addition to the causes of loss excluded in section 12 of the Basic Provisions, we will not insure against damage or loss of production due to:

(1) Theft;

(2) Phytophthora root rot, if you do not maintain cultural practices to minimize the potential for damage due to this pathogen; or

(3) Inability to market the avocados for any reason other than actual physical damage from an insurable cause specified in this section. For example, we will not pay you an indemnity if you are unable to market any avocado fruit due to quarantine, boycott, or refusal of any person to accept such fruit.

10. Duties in the Event of Damage or Loss.

In addition to the requirements of section 14 of the Basic Provisions:

(a) You must notify us at least 15 days before any production from any unit will be sold by direct marketing. We will conduct an inspection and appraisal, if needed, that will be used to determine your production to count for such production. If damage occurs

after this inspection, we will conduct one or more additional inspections as needed. These inspections, and any acceptable records provided by you, will be used to determine your production to count. Failure to give timely notice as required will result in production to count determined as described in section 11(c) if we are not able to determine the amount of such production;

(b) If you intend to claim an indemnity on any unit, you must notify us immediately so we may inspect the unit. You must not sell or otherwise dispose of any damaged production until we have given you written consent to do so, or 15 days, whichever is earlier. If you fail to meet the requirements of this subsection all such production will be considered undamaged and included as production to count;

(c) We will not perform any appraisals of potential production earlier than the July that follows the bloom for the crop year; and

(d) You must notify us immediately if you intend to stump 10 percent or more of the trees on a unit after insurance has attached for the crop year.

11. Settlement of Claim.

(a) We will determine your loss separately for each unit you defined on your acreage report or that we find to exist in accordance with section 2 of these Crop Provisions. If you do not or cannot provide acceptable records of production for the crop year for:

(1) Any optional unit, we will combine all optional units for which such records were not provided; or

(2) Any basic unit, we will allocate commingled production to each basic unit in proportion to our liability on the harvested acreage for each unit.

(b) In the event of loss or damage covered by this policy, we will settle your claim by:

- (1) Multiplying the insured acreage by the production guarantee;
- (2) Subtracting from the result of section 11(b)(1) the total production to count (see section 11(c);
- (3) Multiplying the result in section 11(b)(2) by the price election, by the price election factor, and by your share.
- (c) The total production to count from all insurable acreage on the unit will include the value of all appraised and harvested production, as follows:
 - (1) Appraised production to be counted will include:
 - (i) Not less than the production guarantee per acre for acreage:
 - (A) That is abandoned;
 - (B) That is sold or otherwise disposed by direct marketing if you failed to provide the notice required by section 10 and we were not able to determine the amount of such production;
 - (C) That is damaged solely by uninsured causes; or
 - (D) For which you fail to provide production records that are acceptable to us;
 - (ii) Potential production lost due to uninsured causes;
 - (iii) Unharvested marketable production (the quantity of such production may be reduced as described in section 11(d));
 - (iv) Potential production on insured acreage you intend to put to another use or abandon, if you agree to our appraisal of such production. Upon such agreement, the insurance period for that acreage will end when you put the acreage to another use or abandon the crop. If agreement on the appraised production is not reached:

(A) If you do not elect to continue to care for the crop, we may give you consent to put the acreage to another use if you agree to leave intact, and provide sufficient care for, representative samples of the crop in locations acceptable to us. The production to count for such acreage will be based on the greater of the harvested production or our appraisal in accordance with Section 15(b) of the Basic Provisions from the samples at the time harvest should have occurred. If you do not leave the required samples intact, or fail to provide sufficient care for the samples, our appraisal made prior to giving you consent to put the acreage to another use will be used to determine the production to count; or

(B) If you elect to continue to care for the crop, the production to count for the acreage will be based on the greater of harvested production or our reappraisal in accordance with section 15(b) of the Basic Provisions if additional damage occurs and the crop is not harvested; and

(2) All marketable harvested production (the quantity of such production may be reduced as described in section 11(d)). Any production that is not marketable due to an insured cause of loss will not be included in the production to count.

(d) The quantity of appraised and harvested marketable production may be reduced if the production is considered to be a No. 2 avocado and the price of such marketable production is less than 75 percent of the maximum price election. The quantity of such production will be multiplied by an adjustment factor equal to the lesser of 1.00 or the price of the damaged avocados divided by the maximum price election.

12. Late and Prevented Planting.

Sections 16 and 17 of the Basic Provisions do not apply to these Crop Provisions.

13. Written Agreements.

Section 18 of the Basic Provisions does not apply to these Crop Provisions.

14. Example of Your Insurance Protection

You certify production records that support the yields per acre shown below:

YEAR	YIELD/ACRE
1	4,559
2	2,978
3	10,112
4	2,014
5	2,420

AVERAGE (APPROVED) Yield = 4,417 lbs.

Assume you selected the 65 percent coverage level. The unit contains 10 acres. The production guarantee per acre is:

$$4,417 \times 65\% = 2,871 \text{ lbs. per acre}$$

The production guarantee for the unit is: $2,871 \times 10 \text{ acres} = 28,710 \text{ lbs.}$

Assume further that the price election is \$0.90 per lb. The liability (amount of insurance) for the unit is equal to:

$$28,710 \text{ lbs.} \times \$0.90 = \$25,839$$

Assume the unit produced 15,000 lbs. Your share is 100 percent.

The indemnity is calculated as follows:

$$2,871 \times 10 \text{ acres} = 28,710 \text{ lbs.}$$

$$28,710 \text{ lbs.} - 15,000 \text{ lbs.} = 13,710 \text{ lbs.}$$

$$13,710 \text{ lbs.} \times \$0.90 \times 1.000 = \$12,339.$$

Signed in Washington, D.C., on December 19, 2017.

Heather Manzano
Acting Manager
Federal Crop Insurance Corporation
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